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In The Supreme Court of the United States

WARREN LEE UNDERWOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Apprendi* apply retroactively on collateral review of an initial § 2255 motion?

2. Is it constitutional error for the Ninth Circuit to sua sponte make a finding that the defendant possessed methamphetamine, as such was contrary to the charges in the indictment, where the defendant was charged with conspiracy and attempt to possess methamphetamine and where the evidence at trial clearly showed a conspiracy to possess amphetamines, where this sua sponte finding of possession of methamphetamine served as the basis to affirm judgment and sentence imposed at the lower court?

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OPINIONS BELOW

The opinion and order of the district court, *United States v. Underwood*, denying the Petitioner's § 2255 motion is set forth in the Appendix at A-4. The Court of Appeals opinion, *United States v. Underwood*, No. 01-15547 (9th Cir. Sept. 16, 2002) (unpublished), affirming the denial of the Petitioner's § 2255 motion is set forth in the Appendix at A-1.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 16, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> **AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLEJEOPARDY;SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in pertinent part:

> **AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation[.]

21 U.S.C. § 841 (in effect at the time of the offense) provides in pertinent part as follows:

> **(a) Unlawful acts**
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture,

distribute, or dispense, a controlled substance

. . . .

. . . .

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

. . . .

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than

> 10 years or more than life . . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . .
>
> **(C)** In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), or (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years[.]

21 U.S.C. § 846 provides as follows:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 2255 provides in pertinent part as follows:

> **§ 2255. Federal custody; remedies on motion attacking sentence**
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United states, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a

denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

The Petitioner, Warren Lee Underwood, along with Codefendant David Olson, was charged by indictment with various drug offenses. Defendant was charged with one count of conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One), and one count of attempt to possess methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count Two), but the drug quantity was not charged in the indictment. Underwood was also charged with a weapons offense and two counts under the criminal forfeiture statute. Defendant pleaded not guilty and, following a jury trial, was convicted on all counts. The jury was not instructed nor made any finding as to drug quantity.

At sentencing, the court sentenced Underwood to an enhanced sentence on the drug convictions of mandatory life in prison pursuant to 21 U.S.C. §

841(b)(1)(A)(viii), based on its finding at sentencing by a preponderance of the evidence that the offense of conviction involved more than 100 grams of methamphetamine and that Underwood had two prior felony drug offenses.

On direct appeal, Underwood raised four issues unrelated to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (which had not yet been decided), and the issues presented here. Underwood's conviction was affirmed by the Ninth Circuit in an unpublished opinion filed on July 31, 1998 in Cause No. 97-10344. The Ninth Circuit denied Underwood's Petition for Rehearing on August 21, 1998 in the unpublished order. Underwood's Petition for Writ of Certiorari to the United States Supreme Court was denied on February 22, 1999 in Cause No. 98-1083.

On January 27, 2000, Defendant filed a § 2255 motion, which was later supplemented, raising six claims: (1) the court violated *Apprendi* by treating the quantity (and identity) of the drugs as a sentencing factor rather than as an element of the crimes charged; (2) the government knowingly used false evidence; (3) there was a material variance between the allegations in the indictment and the evidence presented at trial with respect to the identity of the drug involved in the offense; (4) the redaction of the material discoverable pursuant to the Jencks Act constituted prejudicial error; (5) the failure to allow into evidence the entire recorded conversation

between Romine and James constituted prejudicial error; and (6) the evidence did not support the sentencing court's finding that the drug involved in the offense of conviction was methamphetamine.

By final order entered on January 26, 2001, the district court denied the motion on procedural grounds (i.e., *Apprendi* did not apply retroactively on collateral review of a § 2255 motion) without a hearing. By order dated March 16, 2001, the district court granted a certificate of appealability on issues (1), (3), and (6) but denied the certificate with respect to issues (2), (4), and (5).

On appeal, the Ninth Circuit, in an unpublished opinion filed on September 16, 2002, affirmed the district court's order denying Underwood's § 2255 motion. The court rejected each of the three claims presented and held that *Apprendi* did not apply retroactively to cases on initial collateral review under § 2255, citing *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002).

The charges against Underwood arose out of an undercover investigation involving a reverse sting conducted by federal authorities using a confidential informant, Jesse James, and a cooperating coconspirator, Ernest Romine. The charge of attempt to possess with intent to distribute methamphetamine was based on Underwood's alleged complicity in Romine's attempted

purchase of the drugs from Jesse James on February 29, 1996. The conspiracy charge alleged that, on or about October of 1993 through February of 1996, Underwood conspired with Romine and David Olson to possess methamphetamine with intent to distribute. Underwood and Olson were tried together and both were convicted of the charges against them. The government's case against Underwood was based primarily on the testimony of Romine. During his testimony at trial, Romine consistently identified the drug at issue as amphetamine, not methamphetamine.

Shortly before Underwood's arrest, approximately nine pounds of an alleged controlled substance were offered to Romine by undercover law enforcement officers. Underwood was arrested an hour later at a motel miles away from the reverse sting operation. The substance offered to Romine was never chemically tested; however, Underwood's pretrial motion to have the substance tested was denied by the trial court. (A-31, A-49.)

ARGUMENT

I. *APPRENDI* APPLIES RETROACTIVELY ON COLLATERAL REVIEW OF AN INITIAL § 2255 MOTION.

This issue has not been, but should be, decided by this Court. It is an important question of federal law that the lower courts have grappled with since *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided. The federal courts are split on the issue, which has important consequences, particularly under the circumstances presented. This Court, therefore, should take this opportunity to decide this important question and ensure that justice is served in this case.

In *Apprendi v. New Jersey*, this Court announced the following new constitutional rule of law:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case [*Jones*]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is

> exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253 (opinion of Stevens, J.); *see also id.* at 253 (opinion of Scalia, J.).

Id. at 490 (footnote omitted); *see Ring v. Arizona*, 122 S. Ct. 2428 (2002) (under *Apprendi*, capital defendants, no less than noncapital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment; thus, the jury, rather than the judge, must make findings regarding aggravating circumstances necessary for imposition of the death penalty); *see also United States v. Cotton*, 122 S. Ct. 1781 (2002) (applying a plain error analysis to an *Apprendi* violation in a federal drug prosecution); *United States v. John Doe*, Nos. 00-1514(L), 01-1028 (cons.) (2d Cir. July 17, 2002) (*Apprendi* error in drug prosecution constituted plain error and required correction to avoid unfairness and damage to the integrity and public reputation of judicial proceedings; court distinguished case before it from *United States v. Cotton*).

It is now well settled that the *Apprendi* rule is applicable to federal drug cases prosecuted under 21 U.S.C. §§ 841 and 846. *See, e.g., United States v. Cotton; United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). Thus, under *Apprendi*, if the amount of drugs for which a defendant is sentenced results in a sentence beyond the

statutory maximum to which the defendant would otherwise be exposed under 21 U.S.C. § 841(b)(1), such amount must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt, rather than determined by the court under a preponderance of the evidence standard. *See United States v. Cotton; United States v. Nordby.*

There is no dispute in this case that the rule in *Apprendi* was violated. The amount of drugs for which Underwood was sentenced was not charged in the indictment, submitted to the jury, or proven beyond a reasonable doubt. Rather, the amount of drugs was determined by the court at sentencing under a preponderance of the evidence standard. The maximum to which Underwood could have been sentenced for an offense involving methamphetamine without regard to drug amount was 30 years (21 U.S.C. § 841(b)(1)(C), increasing the statutory maximum of 20 to 30 years if a defendant has a prior felony drug offense). Instead, Underwood was sentenced under 21 U.S.C. § 841(b)(1)(A)(viii) (applicable to 100 grams or more of methamphetamine and providing for enhancement based on prior felony drug convictions) to a mandatory term of life imprisonment, based on the court's finding that more than 100 grams of methamphetamine were involved. Thus, the judge's finding, made under a preponderance of the evidence standard, increased the statutory maximum penalty to which Underwood was exposed

from 30 years to life and, moreover, required a mandatory sentence of life while no mandatory minimum would otherwise have been required. Clearly, then, the constitutional rule recognized by *Apprendi* was violated. The only question is whether *Apprendi* applies retroactively on collateral review of an initial § 2255 motion. The federal courts are split on this issue.

Apprendi is required to be applied retroactively on collateral review if its new constitutional rule is considered substantive rather than procedural, *see Davis v. United States*, 417 U.S. 333 (1974), or if it falls within one of the two exceptions to the general rule of nonretroactive application of new constitutional rules of criminal procedure as discussed in *Teague v. Lane*, 489 U.S. 288 (1989).

A majority of the federal circuits have held that *Apprendi* does not apply retroactively on collateral review of an initial § 2255 motion. *See, e.g., United States v. Brown*, No. 01-10116 (5th Cir. Sept. 5, 2002) (observing that the seven circuits that have addressed the issue have held that *Apprendi* does not apply retroactively on collateral review, collecting cases); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002). These cases held that the new constitutional rule announced in *Apprendi* was one of criminal procedure and that it did not fit within either of the two *Teague* exceptions to the

general rule of nonretroactive application. Many of the opinions so holding, however, had strong dissents.

For example, in *United States v. Clark*, 260 F.3d 382, 383 (5th Cir. 2001) (Parker, C.J., dissenting), the court ordered that, in light of *Apprendi*, the case be remanded to the district court to reconsider its ruling denying the defendant's amendment to his § 2255 motion. Circuit Judge Parker, however, dissented from the decision to remand. *Id.* at 383. After a thorough analysis and discussion of authority, Judge Parker found that *Apprendi* announced a new substantive rule and, thus, must be applied retroactively. In so finding, Judge Parker rejected the government's concern that retroactive application of *Apprendi* will call into question tens of thousands of convictions and sentences in drug cases alone, stating:

> I am . . . certain that the Supreme Court was well aware of the potential long-range effect of its decision. The district court in *Pittman* noted with alarm that any conclusion other than a finding of non-retroactivity "could well lead to overwhelming and disastrous results given that every court in every jurisdiction in the country has treated drug quantity as a sentencing factor for the judge to determine for well over ten years." *Pittman*, 120 F.Supp.2d at 1270. While *Teague* clearly counsels that we consider the need for

> finality in criminal matters, *Apprendi* dictates that criminal defendants not be convicted and sentenced for crimes more serious than those charged in their indictments and proved during trial. The fact that the constitutional rights of criminal defendants were violated in a large percentage of cases for a long time by well-meaning prosecutors and good judges does not excuse us from remedying those wrongs.

Id. at 388.

In *United States v. Moss*, 252 F.3d 993, 1003 (8th Cir. 2001) (Arnold, C.J., dissenting), *cert. denied*, 122 S. Ct. 848 (2002), the dissent found that *Apprendi* is procedural but that it falls within the "watershed exception" to the nonretroactivity doctrine of *Teague*, relying on the language used in *Apprendi*:

> The language used by the Supreme Court itself in *Apprendi* is telling. The Court stated: "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' Amdt. 6." 120 S.Ct. at 2355. The Court described the state procedure before it, wherein a factor that

increased the statutory maximum of an offense was decided by the judge, as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system," *id.* at 2366.

The Court further recognized that the reasonable-doubt standard was at stake. This standard, as stated in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), "plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363, 90 S.Ct. at 1068 (quoted case omitted).

To me, this signals the Supreme Court's own understanding that *Apprendi* recognizes bedrock procedures that are implicit in the concept of ordered liberty and that touch on the fundamental fairness of the trial. Indeed, four Justices almost explicitly endorsed a *Teague* exception for *Apprendi* claims by stating, "[t]oday, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as

> a constitutional rule the principle it first identified in *Jones*." 120 S.Ct. at 2380 (O'Connor, J., dissenting). No doubt it is true that civilized systems of justice exist in which judges, not juries, decide criminal cases. But the Anglo-American tradition is otherwise. Every element of a criminal offense must be submitted to and found by a jury beyond a reasonable doubt. I find it regrettable that this Court feels free to minimize the hard-won right of trial by jury.

252 F.3d at 1004.

Moreover, research indicates that three circuits have not yet addressed the issue. *See Derman v. United States*, No. 01-2545 (1st Cir. July 25, 2002) (n.7—declining to address the issue); *Beatty v. United States*, No. 01-2493 (2d Cir. May 24, 2002) (n.3—noting that the Second Circuit currently has *sub judice* the issue in *United States v. Luciano (Parise)*, No. 01-1198 (2d Cir. argued Jan. 28, 2002)); *In re Turner*, 267 F.3d 225, 227 (3d Cir. 2001) (discussing the issue in the context of permission to file a second habeas corpus application which, under §§ 2255 and 2244, requires that the new rule of constitutional law be made retroactive to cases on collateral review by the Supreme Court, and finding that since *Apprendi* is only arguably applicable retroactively but was not made retroactive by the Supreme Court, *Apprendi* was not applicable retroactively on collateral review of a second

habeas application); *see also United States v. Nicholson*, 231 F.3d 445 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1244 (2001) (applying *Apprendi* to § 2255 motion); *Rodgers v. United States*, 229 F.3d 704, 705 (8th Cir. 2000) ("We have . . . accepted review of *Apprendi* claims raised in initial § 2255 motions").

Furthermore, many district courts have held that *Apprendi* does apply retroactively on collateral review. *See, e.g., United States v. Hernandez*, 137 F. Supp. 2d 919 (N.D. Ohio 2001); *Parise v. United States*, 135 F. Supp. 2d 345 (D. Conn. 2001); *Jackson v. United States*, 129 F. Supp. 2d 1053 (E.D. Mich. 2000), *rev'd on other grounds*, 2002 WL 2026583 (6th Cir. Sept. 5, 2002); *Darrity v. United States*, 124 F. Supp. 2d 355 (W.D.N.C. 2000), *rev'd*, 22 Fed. Appx. 277 (4th Cir. 2001); *United States v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000), *rev'd*, 268 F.3d 599 (8th Cir. 2001). *But see, e.g., Vargas v. United States*, 207 F. Supp. 2d 304 (S.D.N.Y.) (*Apprendi* not applicable retroactively on collateral review), *aff'd*, 2002 U.S. Dist. LEXIS 15831 (S.D.N.Y. 2002).

For example, in *United States v. Murphy*, the court applied *Teague* and held that the *Apprendi* decision falls under the second exception to the *Teague* nonretroactivity principle and must be applied to the § 2255 motion before it. In *Murphy*, the defendant was convicted of, inter alia, a federal drug conspiracy and sentenced under 21 U.S.C. § 841(b)(1)(A). Defendant's conviction was affirmed on

direct appeal and he was before the district court on his § 2255 motion. In holding that *Apprendi* should be applied retroactively to the § 2255 motion, *Murphy* explained that the Supreme Court ultimately concluded in *Apprendi* that the Constitution requires a jury finding on any fact which increases the statutory maximum penalty. *Murphy* found that this conclusion "compels a radical shift in criminal procedure in federal drug cases." *Id.* at 1064. As *Murphy* observed after *Apprendi*, to the extent that the government seeks to subject a drug offender to higher penalties under § 841(b)(1)(A) or (b)(1)(B), it must submit drug type and quantity to the jury, and the jury must find those facts beyond a reasonable doubt. *Id.* The implications of the new rule are "particularly significant in drug conspiracy cases." *Id.*

Thus, as *Murphy* found, there can be "little doubt that the sweeping new requirement announced by the Court in *Apprendi* is so grounded in fundamental fairness that it may be considered of watershed importance." *Id.* Accordingly, *Murphy* concluded that the *Apprendi* decision falls under the second exception to the *Teague* nonretroactivity principle and is applicable to motions under § 2255. *See United States v. Nordby*, 225 F.3d at 1060-61 (*Apprendi* violation constituted plain error affecting defendant's substantial rights, and such error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

It is noted, that applying *Apprendi* to the case before it, *Murphy* went on to find that the defendant's sentence under the harsher provisions of § 841(b)(1)(A) violated the *Apprendi* requirements. Accordingly, the court vacated the defendant's sentence and resentenced him under the provisions of § 841(b)(1)(C).

Similarly, in *Darrity v. United States*, the court also held that the second exception of *Teague* applied to *Apprendi* and thus *Apprendi* should be applied retroactively on collateral review. The court further concluded that *Apprendi* was also a substantive decision to which *Teague*'s retroactivity rules do not apply. 124 F. Supp. 2d at 360. Thus, *Darrity* held that *Apprendi* applied to cases on collateral review on this basis as well.

Likewise, in the case currently on review in the Second Circuit, *United States v. Luciano (Parise)*, the district court held that *Apprendi* applies retroactively on collateral review. *See Parise v. United States*, 135 F. Supp. 2d 345 (D. Conn. 2001). *Parise* held that the second exception set forth in *Teague v. Lane*, 489 U.S. 288 (1989), to the general rule of nonretroactive application on collateral review of new constitutional rules of criminal procedure applied to the *Apprendi* decision. This second exception "applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Parise*, 135 F. Supp. 2d at 349

(quoting *Sawyer v. Smith*, 497 U.S. 227, 241 (1990)). As *Parise* explained, the *Apprendi* rule

> is certainly of constitutional dimension as it draws life from a criminal defendant's right to a trial by jury and right to have the jury verdict based on proof beyond a reasonable doubt. *See id.* at 2355-56. Despite its deep-rooted constitutional origins, the rule dramatically alters the manner in which defendants must be indicted, the level and type of evidence the Government must present to prove elements of an offense previously considered to be sentencing factors, and the questions ultimately presented to the jury. Indeed, Justice O'Connor declared *Apprendi* to have established a "watershed rule." *Id.* at 2380 (O'Connor, J., dissenting). Thus, while *Apprendi* did establish a new rule of criminal procedure, it may be applied to cases on collateral review because it is a watershed rule necessary to the fundamental fairness of the criminal proceeding. *See Sawyer*, 497 U.S. at 241-42, 110 S.Ct. 2822. Petitioner's claim is not barred under *Teague*.

135 F. Supp. 2d at 349.

In light of this split in federal authority and the well-reasoned decision holding *Apprendi* retroactively applicable on collateral review, as well as the important

consequences (particularly in this case) which will result from this Court's resolution of this question, this Court should take this opportunity to resolve this important federal question. In this case, as it stands, Underwood's sentence was increased to a statutory mandatory term of life in prison even though, under *Apprendi*, he faced only a maximum sentence of 30 years. In light of the clear violation of *Apprendi* and the harsh results of such a violation, it would be particularly unfair to deprive Defendant of the benefits of the new constitutional rule announced in *Apprendi*. Therefore, this Court should grant Underwood's petition.

II. THERE WAS A MATERIAL VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND THE EVIDENCE PRESENTED AT TRIAL WITH RESPECT TO THE IDENTITY OF THE DRUG INVOLVED IN THE OFFENSE AND THE NINTH CIRCUIT COMMITTED CONSTITUTIONAL ERROR IN SUA SPONTE MAKING A FINDING THAT DEFENDANT POSSESSED METHAMPHETAMINE.

Under the Grand Jury Clause of the Fifth Amendment, a defendant has a right to be tried only on the grand jury's indictment. *United States v. Olano*, 62 F.3d 1180 (9th Cir. 1995), *cert. denied*, 519 U.S. 931 (1996).

This requirement serves the notice-related functions of protecting against unfair surprise, enabling the defendant to prepare for trial, and permitting the defendant to plead the indictment as a bar to later prosecutions. *Id.* Requiring proof to remain true to the indictment enables a grand jury to serve its function of protecting the citizenry. *Id.* A variance occurs when the evidence offered at trial proves facts that are materially different from those alleged in the indictment. *Id.* If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment. *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), *aff'd*, 523 U.S. 511 (1998).

In this case, the indictment identified the drug that the Defendant allegedly conspired to possess with intent to distribute and attempted to possess as methamphetamine. However, the proof at trial showed that the drug allegedly involved was amphetamine. This proof was presented through the testimony of alleged coconspirator Romine. Throughout his testimony, Romine identified the drug at issue as amphetamine, not methamphetamine. Romine expressly and consistently identified the drug at issue as amphetamine. (*See* T. Tr. at 455, 458, 472-73, 476, 478, 480-82, 488-89, 494-98, 502-03.)

The government called in excess of 12 witnesses to testify for the prosecution. Only two of those witnesses

gave testimony that involved methamphetamine, and this testimony was not in support of a conspiracy or attempt to possess methamphetamine. Agent Rodriquez testified that he seized capsules from Underwood that were later determined to contain methamphetamine. (T. Tr. at 188, 195.) Mr. Kalchik, the criminalist, testified that he performed drug tests on the seized capsules and determined that they contained methamphetamine with a total weight, including capsules, of 29.7 grams. (T. Tr. at 264.) This methamphetamine, however, was not relevant to the charges at issue, as recognized by the court and the prosecution. The only other references at trial to methamphetamine were in the questions and arguments made by the prosecution, which, of course, are not evidence.

This variance between the identity of the drug as charged in the indictment and as proved at trial was material and requires reversal of the conviction. *See United States v. Wozniak*, 126 F.3d 105 (2d Cir. 1997) (where indictment charged a drug conspiracy offense involving cocaine but most of proof at trial indicated that offense involved marijuana, defendant's conviction had to be reversed due to impermissible constructive amendment of indictment); *United States v. Bounds*, 985 F.2d 188 (5th Cir.), *cert. denied*, 510 U.S. 845 (1993) (identity of controlled substance is an element of the substantive crime to be determined by the jury). Certainly, at least as to the sentence imposed, the materiality of the variance

is obvious, given that if the drug were amphetamine Underwood's sentence would have been much less severe. In this regard, other courts have held that whether a jury returns a general verdict of guilty to a conspiracy charge under 21 U.S.C. § 846 covering several controlled substances, the court must treat the case as if the defendant conspired to commit an offense involving only the controlled substance carrying the lowest penalty under § 841(b). *See Bounds; United States v. Owens*, 904 F.2d 411 (8th Cir. 1990); *Newman v. United States*, 817 F.2d 635 (10th Cir. 1987); *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984).

The Ninth Circuit rejected Underwood's claim of material variance, stating that "drug type is not an element of the offense; the government need only show that defendant possessed or conspired to possess some controlled substance," citing *United States v. Carranza*, 289 F.3d 634, 644 (9th Cir. 2002). *United States v. Underwood*, No. 01-11547, slip op. at 2 (9th Cir. Sept. 16, 2002) (unpublished). (A-2.) Clearly, however, under *Apprendi*, such statement is wrong. Indeed, the Ninth Circuit has held that, under *Apprendi*, drug type (which, along with drug quantity, fixes the maximum sentence for a conviction) is to be treated "as [] would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt." *United States v. Buckland*, 289 F.3d 558, 568 (9th

Cir. 2002). Accordingly, if the proof at trial failed to establish that the drug at issue was methamphetamine, the trial court could not sentence Underwood on the basis of its finding at sentencing that the drug was methamphetamine.

Moreover, the Ninth Circuit's opinion in this case states that "the evidence presented at trial clearly demonstrated that Underwood possessed methamphetamine." (A-43 (footnote omitted).) Such conclusion is patently incorrect and without support. Underwood was not even charged with possession, but only with attempt and conspiracy to possess methamphetamine, and the evidence adduced at trial went only to these charges. No evidence was presented that Underwood possessed any methamphetamine that was the subject of the indictment. Indeed, the charges arose out of a reverse sting operation, and the substance at issue was in the possession of the undercover agent, not the defendants. And Underwood's pretrial motion to have the substance tested was denied by the trial court. In its opposition to Underwood's motion, the government readily admitted that "[n]either defendant ever possessed methamphetamine, not did the methamphetamine originate from the defendants." (A-41.) Likewise, the district court's opinion and order denying Underwood's motion states that Underwood was charged only with conspiracy and attempt to possess methamphetamine, not possession. Obviously, the Ninth

Circuit misapprehended the nature of the charges and the evidence presented at trial. Such misapprehension further calls into question the affirmance of Underwood's conviction by the Ninth Circuit.

The Ninth Circuit compounds its error by finding that its erroneous holding that the evidence clearly demonstrated that Underwood possessed methamphetamine also requires the conclusion that "Underwood's challenge to the district court's sentencing finding that the offense at issue involved methamphetamine also fails." (A-3 n.1.) This erroneous finding is particularly prejudicial in this case because had Underwood's sentence been based on an offense involving amphetamine rather than methamphetamine 30 years would have been the maximum possible sentence rather than life, as it was in this case.

Underwood's argument that the evidence failed to prove beyond a reasonable doubt that the offense involved methamphetamine is further supported by the government's response to Underwood's § 2255 motion, where it states:

> If the defendant had challenged the type of controlled substance involved in the offense at his sentencing, the government would have been able to establish that the offenses involved methamphetamine by a preponderance of the

> evidence. . . . The government could have proven 20 pounds in count two. In addition, the government could have demonstrated that James and Gonzales provided at least 17 pounds of methamphetamine to Romine[.]

(A-62.) The government's own response thus indicates that the evidence did not prove beyond a reasonable doubt that the drug at issue was methamphetamine. The Ninth Circuit's clearly erroneous finding that Underwood possessed methamphetamine, which formed the basis of its affirmance of Underwood's conviction and sentence, thus constitutes constitutional error.

Therefore, Underwood's conviction should be reversed or, at the least, his sentence should be vacated.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Warren Lee Underwood, respectfully requests this Honorable Court to grant this petition and issue a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

WARREN LEE UNDERWOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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FILED
SEP 16 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No. 01-15547
Plaintiff-Appellee,	) D.C. No. CR-96-5059 REC
v.	) CV-00-5243-REC
WARREN LEE UNDERWOOD,	) MEMORANDUM*
Defendant-Appellant.	)

Appeal from the United States District Court

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Submitted September 9, 2002**

Before: PREGERSON, ALARCON, and WARDLAW, Circuit Judges.

Warren Lee Underwood appeals the district court's denial of his motion pursuant to 28 U.S.C. § 2255. We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

Underwood argues that there was a material variance between the indictment, which alleged that the drug involved in the offenses was methamphetamine, and the evidence offered at trial, which he claims indicated that the drug involved was amphetamine. *See United States v. Olano*, 62 F.3d 1180, 1194 (9th Cir. 1995). However, drug type is not an element of the offense; the government need only show that defendant possessed or conspired to possess some controlled substance. *See United States v. Carranza*, 289 F.3d 634, 644 (9th Cir. 2002). In any event, the evidence presented at trial clearly

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**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

demonstrated that Underwood possessed methamphetamine.[1] Therefore, there was no material variance between the indictment and the evidence.

Underwood's argument that *Apprendi*[2] applies retroactively to cases on initial collateral review was rejected in *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-71 (9th Cir. 2002).

All pending motions are denied.

AFFIRMED.

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[1]For the same reason, Underwood's challenge to the district court's sentencing finding that the offense at issue involved methamphetamine also fails.

[2]*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

WARREN LEE UNDERWOOD,	) No. CV–F-00-5143 REC) (No. CR-F-96-5059 REC)
Petitioner,	)ORDER DENYING)MOTION PURSUANT TO
vs.	)28 U.S.C. § 2255 AND)DIRECTING ENTRY
UNITED STATES OF AMERICA,	)OF JUDGMENT FOR)RESPONDENT
Respondent.	)

On January 27, 2000, petitioner, Warren Lee Underwood, timely filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255. Because of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) on June 26, 2000, supplemental briefs have been filed by the parties concerning the applicability of *Apprendi* to this motion.

Underwood was indicted on March 14, 1996. By the Third Superseding Indictment filed on March 6, 1997, he was charged in Count One with conspiring with Ernest Romine and David Olson from October 1993 to February 29, 1996 to possess with intent to distribute

methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Underwood was charged in Count Two with attempt to possess with intent to distribute methamphetamine on February 29, 1996 in violation of Sections 841(a) (1) and 846. Neither Counts One or Two of the Third Superseding Indictment allege the amount of methamphetamine involved in those counts.[1] Count Five charged Underwood with possession of a firearm on February 29, 1996 in violation of 18 U.S.C. § 922(g) (1).[2] Underwood was convicted following jury trial on all counts. No instructions were given to the jury that the

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[1]At the time Underwood was charged and convicted, Section 841(b) (1) (A) (viii) provided that a person convicted of Section 841(a) (1) involving 100 grams or more of methamphetamine or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. Section 841(b) (1) (B) (viii) provided that a person convicted of Section 841(a) (1) involving 10 grams or more of methamphetamine or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years.

[2]Counts Three and Four are forfeiture counts.

amount of methamphetamine involved is an element of the crimes charged which must be proved by the Government beyond a reasonable doubt. The jury's verdict did not find the amount of methamphetamine involved. Underwood was sentenced to life imprisonment. Underwood unsuccessfuly appealed his conviction and sentence to the Ninth Circuit.

In his Section 2255 motion, Underwood asserts the following grounds for relief: (1) the court erred in treating the quantity and identity of the drugs as a sentencing factor rather than as an element of the crimes charged; (2) the United States knowingly used false evidence; (3) a material variance existed between the allegations of the third superseding indictment and the evidence presented at trial; (4) the reduction of material discoverable pursuant to the Jencks Act constituted prejudicial error; (5) the failure to allow into evidence the entire recorded conversation between Ernest Romine and Jesse James constituted prejudicial error; and (6) the evidence did not support the sentencing court's finding that the drug involved in the offense of conviction was methamphetamine.

A. *Grounds Four and Five.*

Grounds Four and Five described above are conceded by Underwood to have been raised on direct appeal and rejected. As noted by the Government,

petitioner is precluded from reasserting these grounds on collateral review. *See Feldman v. Henman*, 815 F.2d 1318, 1322-1323 (9th Cir. 1987).

Therefore, Grounds Four and Five are denied.

B. *Grounds Two, Three and Six.*

Grounds Two, Three and Six were not raised by Underwood during trial or sentencing and were not raised on direct appeal.

In order to raise grounds on collateral attack that were not previously raised to the trial court or the Court of Appeal, the petitioner must show "cause" excusing his procedural default and "actual prejudice" resulting from the error of which he complains. *United States v. Frady*, 456 U.S. 152, 168 (1982), even when alleging a fundamental constitutional error, *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986).

Underwood argues that the court should conclude that the Government waived its right to assert petitioner's procedural default because of the Government's failure to file its opposition to this motion within the time ordered by the court.

The court concludes that the Government has not waived its right to assert petitioner's procedural default.

The record in this action establishes that the Government requested and obtained permission from this court to file the response three days late for what the court considered was good cause.

Petitioner further contends that the intervening change in the law based on *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey, supra, see discussion infra*, establishes "cause" for the failure to raise these grounds for relief sooner. Petitioner contends that "[t]his change in law pertains to all of the issues not previously raised, at least to some degree."

The issuance of the Supreme Court's opinions in *Jones* and *Apprendi* does not constitute "cause" for Underwood's failure to raise that the United States knowingly used false evidence, that a material variance existed between the allegations of the Third Superseding Indictment and the evidence presented at trial and/or that the evidence did not support the sentencing court's finding that the drug involved in the offense of conviction was methamphetamine. The holdings in *Jones* and *Apprendi* has nothing to do with these claims. As the Supreme Court has held, the existence of cause for a procedural default must ordinarily turn on whether the petitioner can show that same objective factor external to the defense impeded efforts to raise these issues during trial and on appeal. *See Murray Carrier, supra*, 477 U.S. at 488.

Underwood further contends that he has shown cause for the procedural default with respect to the ground that the United States knowingly used false evidence. In so contending, petitioner asserts that his contention that Ernest Romine testified falsely at the trial concerning the terms of his plea agreement with the United States is "newly discovered evidence".

However, Romine's written plea agreement was provided to petitioner as Jencks Act material. Therefore, it cannot be stated by petitioner that the terms of Romine's plea agreement with the United States were not known to petitioner during trial or on appeal.

Finally, petitioner contends that his procedural default "should not act as a bar based on the 'miscarriage of justice gateway.'".

However, petitioner has not made any showing that the procedural bar should be disregarded because of the "miscarriage of justice gateway". The Supreme Court limits the "miscarriage of justice" exception to petitioner who can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Actual innocence means factual innocence, not merely legal insufficiency. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). A mere showing of reasonable doubt is not enough. *See Wood v. Hall*, 230 F.3d 373, 379 (9th Cir. 1997), *cert. denied*,

523 U.S. 1129 (1998). To show actual innocence, "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997).

Therefore, the court should conclude that Grounds Two, Three and Six are barred.

C. *Ground One.*

As noted, Ground One asserts that the court erred in treating the quantity and identity of the controlled substances as a sentencing factor rather than as an element of the crimes charged. Petitioner contends that this court did not have jurisdiction because the Third Superseding Indictment failed to allege the quantity of the controlled substances as an element of the crimes charged.

Underwood's initial motion was based on the Supreme Court's decision in *Jones v. United States, supra*, 526 U.S. 227. In *Jones*, the Supreme Court held that higher statutory penalties found within the federal carjacking statute, 18 U.S.C. § 2119, set forth additional elements of the offense wich must be alleged in the indictment and proven beyond a reasonable doubt. As noted, Underwood has since supplemented his motion and seeks to rely on *Apprendi v. New Jersey, supra*, 530 U.S.

466. In *Apprendi*, the Supreme Court held in pertinent part:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule . . . : '[I]t is unconstitutional for a legislature to remove from a jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'

526 U.S. at 252-253.

In *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), the Ninth Circuit, in a case involving direct review, that *Apprendi* applies to federal drug convictions such that any enhanced penalty based upon drug quantity under Section 841(b) must be premised upon a factual finding beyond a reasonable doubt.

As noted, Underwood did not assert this error to the district court or on direct appeal, thereby raising the

issue of whether *Apprendi* should be applied retroactively to this motion.

In general, new constitutional rules of criminal procedure apply retroactively only to cases which are on direct state or federal appeal at the time the rule is announced. *See Griffith v. Kentucky*, 479 U.S. 314 (1987). A new rule is not to be applied retroactively on collateral review unless the new rule falls within one of two narrow exceptions: (1) the new rule places certain kinds of primary conduct beyond the power of the criminal lawmaking authority to proscribe, or (2) the new rule requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague v. Lane*, 489 U.S. 288, 305-310 (1989). Retroactivity under *Teague* is a "threshold matter" which must be addressed "before considering the merits of [a] claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

The Ninth Circuit has ruled that *Apprendi* established a new rule. *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2000). Therefore, the court must conduct an analysis of the *Teague* factors to determine if the new rule should be applied retroactively to this Section 2255 motion under the exception to nonretroactivity on collateral review because the new rule requires the

observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.[3]'" *Teague, supra.*

In *Jones v. Smith,* the only Ninth Circuit case to discuss the retroactivity of *Apprendi* to date, the Ninth Circuit applied *Apprendi* to a state petitioner's habeas claim that his conviction was unconstitutional based upon a variance between the indictment and the charge actually presented to the jury. In so holding, the Ninth Circuit held in pertinent part:

> The second exception identified in *Teague* requires the retroactive application of certain 'watershed rules of criminal procedure.' *Teague,* 489 U.S. at 312 . . . Retroactive application will occur where both (1) a failure to adopt the new rule 'creates an impermissibly large risk that the innocent will be convicted,' and (2) 'the procedure at issue . . . implicate[s] the fundamental fairness of the trial.' *Id.* In order to qualify under this exception, the new rule must do more that systematically enhance the reliability of a criminal proceeding; the rule must be an absolute

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[3]The court does not discuss the other exception because it clearly is inapplicable.

prerequisite to the trial's fundamental fairness. *See Carriger*, 948 F.2d at 598.

In the case at bar, the *Apprendi* rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial. Certainly, any civilized society will grant a criminal defendant the right 'to be informed of the nature and cause of the accusation' against him. U.S. Const. amend. VI. But we need not strain our imaginations too much in order to envision a fundamentally fair trial in the aftermath of a flawed information. Indeed, the facts of the case at bar amply illustrate that the text of an information is not the only means for informing a defendant of the nature and cause of the accusation. Where the defendant has actual notice of the nature and cause of the accusation against him, as well as the possible sentences he might receive, the omission of particular key words from the written information neither increases the risk that an innocent person will be convicted nor hinders the fundamental fairness of the trial. We therefore decline to

> apply the *Apprendi* rule, insofar as it effects discrepencies between an information and jury instructions, retroactively to Petitioner's claim.

231 F.3d at 1237-1238.

In *United States v. Pittman*, 120 F.Supp.2d 1263 (D.Or. 2000), the district court held that *Apprendi* should not be applied retroactively to cases on collateral review in which the petitioner challenges a sentence imposed by virtue of a judicial finding of fact substantiating a statutory sentencing enhancement by a preponderance of the evidence. In so holding, the district stated in pertinent part:

> Petitioner's claim invokes two aspects of the *Apprendi* decision: (1) the right to have a jury, rather than a judge, determine a fact (drug quantity) triggering higher statutory maximum penalties; and (2) the right to such a factual determination proven beyond a reasonable doubt rather than by a preponderance of the evidence. If they apply retroactively, these two 'new rules' apply with equal force to cases that arise from a conviction based upon a jury verdict; the fact that the conviction in this

case is premised upon a guilty plea is of no import.

. . .

[T]he sole issue is whether the fact that the petitioner entered a plea not knowing that the government should have born the burden of proving drug quantity beyond a reasonable doubt constitutes the type of 'watershed' rule(s) triggering retroactive application. In *Teague*, the Court explained that this narrow exception should be limited to those procedures implicating 'fundamental fairness' or which are 'central to an accurate determination of innocence or guilt.' *Teague*, 489 U.S. at 312 . . . .

In [*United States*] *v. Mandanici*, [205 F.3d 519 (2nd Cir.), *cert. denied*, 121 S.Ct. 190 (2000)], the Second Circuit noted that the Supreme Court has repeatedly 'underscored the narrowness of the second *Teague* exception.' 205 F.3d at 528. The Second Circuit examined eleven new rules announced by the Supreme Court and analyzed under the *Teague* framework and noted that in all eleven cases, the Court held that the rule at issue should not be

applied retroactively. *Id.* . . . The right to counsel is a 'watershed' rule subject to retroactive application. *See id.* (discussing Supreme Court's example of *Gideon v. Wainright* . . . as the type of rule that fits within the watershed exception); and *Bell v. Hill*, 190 F.3d 1089 (9th Cir. 1999) (right to counsel relative to making a motion for new trial), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1269 . . . (2000). The Ninth Circuit has held that a trial court's failure to instruct the jury as to any of the elements of the charge submitted to the jury was an issue of fundamental fairness that must be applied retroactively assuming that the rule was 'new.' *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995). The court was careful to condition its holding by expressly emphasizing twice that the case did 'not involve the failure to instruct on a single element of an offense.' *Id.* at 963, 967.

New rules held riot to constitute watershed developments include the right of a defendant to challenge the race-based exclusion of jurors, *Jones v. Gomez*, 66 F.3d 199 (9th Cir. 1995), a defendant's right to inform a sentencing jury that he is ineligible for parole under certain

circumstances. *O'Dell*, 521 U.S. at 167 . . . , a defendant's right not to have a jury consider certain invalid aggravating circumstances, *Lambrix v. Singletary*, 520 U.S. 518, 539-40 . . . (1997), or the failure to instruct a jury that it could not convict a defendant if it found a mitigating mental state. *Gilmore v. Taylor*, 508 U.S. 333, 345-46 . . . (1993).

I find that the two new rules announced in *Apprendi* that: (1) a jury, rather than a judge, must determine facts supporting a statutory sentencing enhancement and (2) that this determination must be made beyond a reasonable doubt - are not the type of 'watershed' rules implicating fundamental fairness and thus, requiring retroactive application on collateral review. First, I find that the new *Apprendi* rules do not directly relate to the accuracy of the conviction or sentence. Like the application of *Gaudin* to convictions for making false statements in federal loan applications, the factual inquiry and determinations were made; they were simply made by a different factfinder. Further, the fact that the application of a different standard of review might lead to

different results is insufficient. In *Mackey v. U.S.*, 401 U.S. 667 . . . , the Supreme Court expressly rejected a claim that the mere 'probability' that a different result would be reached by application of a new rule was sufficient to trigger retroactive application. . . . .

On these principles, I agree with the Second Circuit . . . that shifting an element of the offense from jury to judge and utilizing a preponderance rather than beyond a reasonable doubt standard does not implicate fundamental fairness. I further note that any other conclusion could well lead to overwhelming and disasterous results given that every court in every jurisdiction in the court has treated drug quantity as a sentencing factor for the judge to determine for well over ten years. Respect for the doctrine of finality, a critical component underlying the Supreme Court's decision in *Teague*, must impose some reasonable limits. Requiring retroactive application of *Apprendi* to every federal and state sentence imposed under such a bifurcated fact-finding system would necessitate a review of thousands of cases when actual innocence of the

> defendant of the charge and sentence is not in doubt.

120 F.Supp.2d at 1268-1270. *See also Ware v. United States*, 124 F.Supp.2d 590 (M.D.Tenn. 2000); *West v. United States*, 123 F.Supp.2d 845 (D.Md. 2000).

Reaching the contrary conclusion is *United States v. Murphy*, 109 F.Supp.2d 1059 (D.Minn.2000), wherein the district court stated in pertinent part:

> This conclusion [in *Apprendi* that the Constitution requires a jury finding on any fact which increases the statutory maximum penalty] compels a radical shift in criminal procedure in federal drug cases. This court has presided over countless trials and sentencings in which the court has served as the ultimate decision maker as to drug quantity. Indeed, the jury is often specifically instructed that it is not necessary for the government to prove the exact or precise amount of the drug alleged in the indictment. As such, a jury finding as to quantity is rare. . . . .
>
> After *Apprendi*, to the extent that the government seeks to subject a drug offender to the higher penalties under

841(b) (1) (A) OR (b) (1) (B), it must submit drug type and quantity to the jury, and the jury must find those facts beyond a reasonable doubt. The implications of the new rule are particularly significant in drug conspiracy cases. As the Court itself noted in *Apprendi*, 'There is a vast difference between . . . a judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.' . . . .

There can be little doubt that the sweeping new requirement announced by the Court in *Apprendi* is so grounded in fundamental fairness that it may be considered of watershed importance. Accordingly, the court concludes that the *Apprendi* decision falls under the second exception to the *Teague* nonretroactivity principle and must be applied to this section 2255 motion.[3]

[3]The court is mindful of the potential impact of the conclusion that *Apprendi* is applicable retroactively . . . However, the court notes that with respect to federal

> drug cases, petitions for collateral review may be filed only in those cases in which the sentence exceeds the 20-years maximum imposed by 21 U.S.C. § 841(b)(1)(C) . . . Moreover, qualified petitioners will have to overcome the additional barriers imposed by . . . AEDPA . . . including the one-year statute of limitations . . ., the restrictions on successive petitions . . . and the heightened standard of review for state prisoners.

109 F.Supp.2d at 1064.

The court is persuaded by the rationales of *Pittman, Ware* and *West* that the new rule of *Apprendi* is not applied retroactively on collateral review.

ACCORDINGLY, IT IS ORDERED that petitioner Warren Lee Underwood's Motion to Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 is denied.

JUDGMENT FOR RESPONDENT TO BE ENTERED

Dated: Jan. 26, 2001

/s/

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

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Telephone: (209) 498-7272

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	) CR. NO. 96-5059 REC
Plaintiff,	)VIOLATIONS: 21 U.S.C. §§)841(a) (1) and 846 -
v.	)Conspiracy to Possess with)the Intent to Distribute a)Controlled Substance; 21
WARREN LEE UNDERWOOD, ERNEST TUBBS ROMINE, and DAVID OLSON,	)U.S.C. §§ 841(a)(1) and)846 - Attempt to Possess)a Controlled Substance with)the Intent to Distribute; 21)U.S.C. § 853 - Criminal
Defendants.	)Forfeiture (2 Counts)

THIRD SUPERSEDING INDICTMENT

COUNT ONE: [21 U.S.C. §§ 841(a) (1) & 846 - Conspiracy to Possess With the Intent to Distribute a Controlled Substance]

The Grand Jury charges:

WARREN LEE UNDERWOOD,
ERNEST TUBBS ROMINE, and
DAVID OLSON,

defendants herein, beginning at a time unknown to the grand jury, but no later than on or about October, 1993, and continuing thereafter up to and including on or about February 29, 1996, in the County of Kern, State and Eastern District of California, and elsewhere, did knowingly and intentionally agree and conspire together, and with other persons unknown to the grand jury, to possess with the intent to distribute methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a) (1) and 846.

COUNT TWO: [21 U.S.C. §§ 841(a) (1) & 846 - Attempt to Possess a Controlled Substance with Intent to Distribute]

The Grand Jury further charges:

WARREN LEE UNDERWOOD, and
ERNEST TUBBS ROMINE,

defendants herein, on or about February 29, 1996, in the County of Kern, State and Eastern District of California, did knowingly and intentionally attempt to possess with intent to distribute methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a) (1) and 846.

COUNT THREE: [21 U.S.C. § 853 - Criminal Forfeiture]

The Grand Jury further charges: T H A T

By virtue of committing one or both of the offenses alleged in Counts One and Two, which are incorporated herein by reference, WARREN LEE UNDERWOOD, and ERNEST TUBBS ROMINE shall forfeit to the United States $102,163.00 in United States currency which constituted proceeds said defendants obtained directly and indirectly as a result of the foregoing violations, and constituted property used or intended to be used in any manner or part to commit or facilitate the commission of the violations.

COUNT FOUR: [21 U.S.C. § 853 - Criminal Forfeiture]

The Grand Jury further charges: T H A T

By virtue of committing one or both of the offenses alleged in Counts One and Two, which are incorporated herein by reference, WARREN LEE UNDERWOOD, shall forfeit to the United States the following property which constitutes proceeds said defendants obtained directly and indirectly as a result of the foregoing violations, and constitutes property used or intended to be used in any manner or part to commit or facilitate the commission of the violations:

1. One Beretta .25 caliber semi-automatic handgun, serial number BBS23234V;

2. Radio shack programmable scanner, serial number 45027186;

3. Night vision scope and sound amplification headphones in a black case;

4. China-made SKS rifle, 7.62X39 caliber, serial number 34180 with two thirty round clips;

5. Favorite model 1915, .32 long caliber, single shot rifle;

6. Cobray model DD, .45 caliber Derringer, Serial number C00013426;

7. Rossi .22 caliber Derringer pistol, Serial [number] E324470;

8. Twist-2 Brand .22 caliber Derringer pistol, Serial number ED7988;

9. Alamo/Ranger .38 Special caliber pistol, Serial number 8287;

10. Interarms double barrel 12 gauge shotgun, Serial number T124877;

11. FIE .44 caliber revolver, Serial number S5948;

12. Radio Shack brand frequency counter;

13. Counter-surveillance equipment for phone lines;

14. Realistic scanner, 10 channel, Serial number 15048582;

15. Uniden scanner, Serial number 45008981;

16. Raven Arms model MP25, 25 caliber semi-automatic, Serial number 1094033;

17. Interarms .22 Caliber Rifle, serial number 432354; and

18. Three Thousand Dollars ($3,000) in U.S. Currency.

COUNT FIVE: [18 U.S.C. § 922(g) - Felon In Possession Of Firearm]

The Grand Jury further charges: T H A T

WARREN LEE UNDERWOOD,

defendant herein, on or about February 29, 1996, in the County of Kern, State and Eastern District of California, having been convicted [of] a crime punishable by a term of imprisonment of more than year [sic], did knowing [sic] possess a firearm, that is: Smith and Wesson .38 caliber revolver, model 10-8, serial number 4547 62669, in and affecting commerce in that it had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 922(g) (1).

A TRUE BILL.

_____

FOREPERSON

CHARLES J. STEVENS
United States Attorney

By _____
CARL M. FALLER, JR.,
Assistant U.S. Attorney
Chief, Fresno Office

LAW OFFICE OF ALEX R. TANDY, P.C.
ALEX R. TANDY, ESQ.
8751 Highway 80 West
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JAMES R. HOMOLA
2950 Mariposa, Ste. 250
Fresno, California 93721
TEL: (209) 441-7111

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.		NO. CR-F-96-5059-REC
WARREN LEE UNDERWOOD	§	
AND ERNEST TUBBS ROMINE	§	

MOTION TO INSPECT AND COMPEL PRODUCTION OF SAMPLES OF THE ALLEGED METHAMPHETAMINE FOR INDEPENDENT TESTING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, WARREN LEE UNDERWOOD, by and through his attorney, ALEX R. TANDY, and moves this Honorable Court, pursuant to Fed. R. Crim. P. 16(a) (1) (C), to allow Defendant to inspect the alleged methamphetamine at issue in this case and to compel the government to produce samples of the substance for independent testing. As the accompanying memorandum explains, Rule 16 gives the Defendant the right to such inspection and testing.

Respectfully submitted,

LAW OFFICE OF ALEX R. TANDY, P.C.

ALEX R. TANDY
State Bar No. 19635000
Attorney for Defendant
8751 Highway 80 West, Ste. 124
Fort Worth, Texas 76116
Tel: 817-560-8300 Fax: 817-560-1216

CERTIFICATE OF SERVICE

As Attorney of Record for Defendant, I do hereby certify that a true and correct copy of the above and foregoing document was this date provided to:

OFFICE OF THE UNITED STATES ATTORNEY

Attn: Kathleen A. Servatius
Federal Building
1130 O Street
Fresno, California 93721

OFFICE OF THE FEDERAL DEFENDER

Attn: Richard Rainwater
2300 Pulare Street
Fresno, California 93721

June 21, 1996

_____
ALEX R. TANDY

LAW OFFICE OF ALEX R. TANDY, P.C.
ALEX R. TANDY, ESQ.
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.		NO. CR-F-96-5059-REC
WARREN LEE UNDERWOOD	§	
AND ERNEST TUBBS ROMINE	§	

MEMORANDUM IN SUPPORT OF MOTION TO INSPECT AND COMPEL PRODUCTION OF SAMPLES OF THE ALLEGED METHAMPHETAMINE FOR INDEPENDENT TESTING

INTRODUCTION

The government has alleged that Co-Defendant Romine attempted to purchase ten (10) pounds of methamphetamine from a confidential informant and an undercover officer. This alleged methamphetamine was shown to Romine on February 29, 1996, just before his arrest. Defendant has reason to doubt that the substance shown to Romine was actually methamphetamine, or that there was actually ten (10) pounds involved. Defendant, therefore, would like to independently test the substance and also verify its weight.

ARGUMENT

DEFENDANT IS ENTITLED TO INSPECT THE SUBSTANCE ALLEGED TO BE METHAMPHETAMINE AND TO OBTAIN SAMPLES FOR INDEPENDENT TESTING.

Fed. R. Crim. P. 16 (a)(1)(C) provides:

> (C) Documents and Tangible Objects. Upon request of the Defendant the government shall permit the Defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the Defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the Defendant.

In cases involving a controlled substance, a concomitant part of the examination or inspection is the right of the Defendant to have an independent analysis performed on the substance. *United States v. Butler*, 988 F.2d 537 (5th Cir. 1993); *United States v. Boel*, 708 F. Supp. 177 (W.D. Tenn. 1989). This inspection and testing of the substance is also required under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). See *United States v. Noel, supra.*

Clearly, the nature and weight of the substance alleged to be methamphetamine is material to the Defendant's defense. Therefore, Defendant has a right to

inspect and independently test the alleged methamphetamine at issue in this case.

Based on the foregoing argument and authority, Defendant's Motion to Inspect and compel the government to produce samples of the alleged methamphetamine should be granted.

Respectfully submitted,

LAW OFFICE OF ALEX R. TANDY, P.C.

ALEX R. TANDY
State Bar No. 19635000
Attorney for Defendant
8751 Highway 80 West, Ste. 124
Fort Worth, Texas 76116
Tel: 817-560-8300 Fax: 817-560-1216

CERTIFICATE OF SERVICE

As Attorney of Record for Defendant, I do hereby certify that a true and correct copy of the above and foregoing document was this date provided to:

OFFICE OF THE UNITED STATES ATTORNEY

Attn: Kathleen A. Servatius
Federal Building
1130 O Street
Fresno, California 93721

OFFICE OF THE FEDERAL DEFENDER

Attn: Richard Rainwater
2300 Pulare Street
Fresno, California 93721

June 21, 1996 _____
ALEX R. TANDY

CHARLES J. STEVENS
United States Attorney
KATHLEEN A. SERVATIUS
Assistant U.S. Attorney
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Telephone: (209) 498-7272

ORIGINAL
FILED

JUL 01 1996

CLERK, U.S.
DIST. COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)CR. F. NO. 96-5059 REC
	)
	)GOVERNMENT'S
Plaintiff,	)OPPOSITION TO
	)DEFENDANT'S MOTION
v.	)TO TEST
	)METHAMPHETAMINE
	)AND FOR DISCLOSURE OF
	)CONFIDENTIAL
WARREN LEE UNDERWOOD,	)INFORMANT
	)
	)Hearing: July 22, 1996
Defendant.	)Time: 10:00 a.m.
	)Dept: Courtroom One
_____	)Honorable Robert E. Coyle

The United States of America, by and through Charles J. Stevens, United States Attorney, and Kathleen A. Servatius, Assistant United States Attorney, hereby submits its opposition to defendant's motion to test the methamphetamine and for disclosure of the confidential informant.

FACTS

Between January 25, 1996, and February 29, 1996, Romine negotiated to buy 19 pounds of methamphetamine from a confidential informant for a price of $7,500 per pound. Arrangements had been made for the deal to take place on February 29, 1996. At that time, Romine told the informant that the man he had met with after their prior meeting was the "money man" for the deal. Romine was arrested after viewing the 10 pounds of methamphetamine and in possession of approximately $75,000 for the purchase.

The methamphetamine which was shown to Romine and was taken from the Bakersfield P.D. evidence locker.

ARGUMENT

I. MOTION TO TEST METHAMPHETAMINE.

Rule 16(a) (1) (C) of the Federal Rules of Criminal Procedure provides that a criminal defendant is entitled to discovery of materials "which are within the possession, custody, or control the government, and which are material to the preparation of the defendant's defense." *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). To obtain discovery under Rule 16, the defendant must make a *prima facie* showing of materiality. *Id.* Neither a general description of the information sought nor conclusory allegations of materiality suffice; he must present facts which would tend to show that the government is in possession of information helpful to the defense. *Id.*

The defendant is charged with conspiring (conspiracy) to possess methamphetamine with intent to distribute it, and aiding and abetting the attempt to possess methamphetamine with the intent to distribute it (attempt). Neither defendant ever possessed methamphetamine, nor did the methamphetamine originate from the defendants. The defendants were arrested as the result of a "reverse" undercover operation, that is, the informant who had provided methamphetamine to Romine in the past, offered to sell methamphetamine to Romine. Although the informant

told Romine he had 19 pounds of methamphetamine available for sale, the initial purchase would be for 10 pounds. The reports provided to the defense indicate that real methamphetamine, in the possession of the Bakersfield Police Department, was taken to the crime scene and shown to Romine. After Romine showed the money to the undercover officer, he was arrested.

In this case, whether the drug shown to Romine was in fact, methamphetamine, is irrelevant to these proceedings. The defendants are not charged with possession of methamphetamine with intent to distribute (a crime which would require the government to prove that the substance possessed by the defendant was, in fact, a controlled substance). This makes the cases cited by the defendant inapposite.

The government can convict the defendants of conspiracy even if the government showed him sugar. *United States v. Thompson*, 493 F.2d 305, 308 (9th Cir. 1974).

In *Thompson*, the defendants argued that Rule 16 was violated when the government failed to turn over scientific test results of marijuana, and that the jury should have been instructed that the government was required to prove that the substance they imported was, in fact, marijuana. *United States v. Thompson*, 493 F.2d at 310. The defendants were charged and convicted of

conspiring to import marijuana into the United States based on the testimony of three individuals that the defendants had arranged for the importation. No marijuana was seized or introduced into evidence at the trial of this case.

The defendant argued that the jury should have been instructed that the substance which had been smuggled was, in fact, marijuana. This was something that could not be proved since no marijuana had been seized. The Ninth Circuit rejected this argument and held that the crime of conspiracy is complete upon the agreement to violate the law and one overt act[1]; and is not dependent upon the ultimate success or failure of the planned scheme. *Id.* at 310. The Court stated: "Thus, whether or not the substance involved was marijuana is irrelevant." *Id.*

Even if the defendant tested the methamphetamine and determined that it was sugar, he could not defend against a conspiracy or an attempt charge using the argument that it was legally impossible for him to conspire to possess a substance which was, in

---

[1]The Supreme Court has held that proof of an overt act is not required when a defendant is charged with 21 U.S.C. § 846. *United States v. Shabani*, 115 S.Ct. 382 (1994).

fact, sugar. The Ninth Circuit has recognized that the doctrine of legal impossibility is not a defense to a conspiracy or an attempt charge. *United States v. Bosch*, 951 F.2d 1546, 1550 (9th Cir. 1991); *United States v. Everett*, 692 F.2d 596, 599 (9th Cir. 1983); *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981).

When the government charges attempted possession, it need not prove that the defendant ever possessed methamphetamine or any kind of controlled substance. *United States v. Steward*, 16 F.3d 317, 320 (9th Cir. 1994). In *Steward*, the defendant attempted to sell one-quarter pound of methamphetamine to undercover agents. They negotiated the purchase and arranged to meet to complete the sale but the defendant was arrested immediately upon his arrival at the transaction. He was found in possession of one-quarter pound of ephedrine, not methamphetamine. The court rejected the defendant's argument that he could not be convicted of an attempted sale of methamphetamine because he possessed only ephedrine. *Id.* at 319.

The sentencing guidelines provide that the defendant's offense level for the crimes of attempt and conspiracy shall be the same as if the object of the conspiracy or attempt had been completed. U.S.S.G. § 2D1.1. This means that the defendant will be sentenced in accordance with the quantity of drugs under

negotiation and will not be affected by purity or actual weight.

Therefore, the defendant has failed to show how his request to test the substance shown to his co-defendant at the time of his arrest is material or relevant to his defense.

II. MOTION TO DISCOVER IDENTITY OF INFORMANT.

The government has revealed the identity of the informant to counsel for the defendant.

CONCLUSION

The defendant's motion should be denied.

DATED: July 1, 1996

Respectfully submitted,

CHARLES J. STEVENS
United States Attorney

By *Kathleen A. Servatius*
KATHLEEN A. SERVATIUS
Assistant U.S. Attorney

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES OF AMERICA,	)Case No. CR-F-96-5059 REC
Plaintiff,	)
v.	)
WARREN LEE UNDERWOOD,	)
Defendant.	)

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

That on 7/1/96, she served a copy of the attached:

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO TEST METHAMPHETAMINE AND FOR DISCLOSURE OF CONFIDENTIAL INFORMANT

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Fresno, California; or by placing said copy into an interoffice delivery receptacle located in the Clerk's Office of the U.S. District Court in Fresno, California.

SERVICE BY MAIL, INTER-OFFICE DELIVERY

Alex R. Tandy
Attorney at Law
8751 Highway 80 West
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Fort Worth, TX 76116-6100

James R. Homola
Attorney at Law
2950 Mariposa, Suite 250
Fresno, CA 93721

Cozetta Roberts
COZETTA ROBERTS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)NO. CR-F-96-5059 REC
	)
Plaintiff,	)ORDER RE DEFENSE
	)MOTIONS HEARD ON
vs.	)SEPTEMBER 16, 1996
	)
ERNEST ROMINE, et al.,	)
	)
Defendant.	)
	)

On September 16, 1996, the court conducted an evidentiary hearing in connection with defendant Underwood's Motion to Suppress Evidence and heard oral argument in connection with defendant Underwood's other motions.[1]

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its rulings as and for the reasons set forth herein.

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[1]Defendant Romine's Motion for Discovery was resolved at oral argument.

A. Motions to Suppress Evidence.

Defendant Underwood filed two separate Motions to Suppress Evidence.

1. Room 211, Motel 6, 1350 Easton Drive, Bakersfield, California.

a. Effectiveness of Romine's Consent to Search.

It is undisputed that, prior to the entry into the motel room, the officers obtained the written consent to search the motel room from co-defendant Romine, in whose name the room was rented, and that Romine was not present when the officers entered the motel room.

In *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1030 (1996), the Ninth Circuit held that a consent to search given by a co-occupant is valid as against the defendant when both are on the scene but the defendant has refused to consent. The Ninth Circuit explained:

> We now agree with the courts that have answered that question in the affirmative. We agree that the primary factor is the defendant's reasonable expectations under the circumstances. Those expectations must

include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry. The risks to property or privacy interests are not substantially lessened because of the defendant's own lack of consent. Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain. A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence. As the Supreme Court said in *Matlock*, where people have joint access and control over property 'it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' . . . .

However, the Ninth Circuit noted that it was "express[ing] no opinion on the question whether a co-occupant who is *not* present on the scene could give a consent that would be effective against an objecting co-occupant who *was* present." *Id.* At 536 n.5.

Here, the court is faced with the issue reserved in *Morning*. The court is persuaded that Romine's absence from the motel room does not vitiate the validity of his consent to search the motel room. *United States v. Bradley*, 869 F.2d 417, 419 (8th Cir. 1989); *People v. Veiga*, 214 Cal.App.3d 817, 821-827 (1989).

b. Exigent Circumstances.

The warrantless entry into the motel room is also justified by the exigent circumstances exception to the warrant requirement. The evidence presented at the evidentiary hearing establishes that the officers reasonably believed that the motel room was occupied by defendant Underwood and that evidence or contraband was in imminent danger of being destroyed by Underwood given the lapse of time between the arrest of defendant Romine and his failure to return to the motel room following the narcotics transaction. *United States v. Perdomo*, 800 F.2d 916, 918-920 (9th Cir. 1986).

c. Securing Motel Room Pending Search Warrant.

The court concludes from the record in this action that the securing of the motel room pending issuance of a warrant to search the motel room did not violate the Fourth Amendment. *Segura v. United States*, 468 U.S. 796, 810 (1984).

d. Sufficiency of Affidavit.

The court further concludes that the affidavit to the application for the search warrant to search the motel room provides probable cause under the standards set forth in *Illinois v. Gates*, 462 U.S. 213 (1983). The affidavit relates the results of the surveillance and the statements made by defendant Romine following his arrest. The affidavit sets forth probable cause to believe that contraband and/or evidence of narcotics trafficking would be located in the motel room.

e. Overbreadth of Search Warrant.

Defendant's assertion that the search warrant did not satisfy the particularity requirement of the Fourth Amendment is without merit.[2]

---

[2]Defendant's suggestion that the omission from the affidavit to the search warrant of the facts that Romine had consented to the search of the motel room and that the motel room had been secured pending issuance of the search warrant entitle defendant to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) also is without merit. Defendant has not established the prerequisites to a *Franks* hearing.

2. Residence in Somerville County, Texas.

The court concludes that the affidavit to the search warrant for defendant's residence in Somerville County, Texas complies with the requirements of the Fourth Amendment under the standards governing this court's review of the sufficiency of affidavits in support of search warrants.

B. Motion for Bill of Particulars.

The proper functions of a bill of particulars are (1) to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, (2) to avoid or minimize the danger of surprise at the time of trial, and (3) to enable the defendant to plead his acquittal or conviction in bar of another prosecution for the same offense. *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Andrin*, 501 F.2d 1373 (9th Cir. 1974). A bill of particulars should be granted only if the indictment, when coupled with discovery, fails sufficiently to acquaint the defendant with the charges against him so that he would be unable to prepare his defense and not be taken by surprise at the trial, or fails sufficiently to protect the defendant against another prosecution for the same offense. *United States v. Long*, 706 F.2d 1044 (9th Cir. 1983); *United States v. Sullivan*, 421

F.2d 676 (9th Cir. 1970). Thus, full discovery pursuant to the rules of discovery obviates the need for a bill of particulars. *United States v. Mitchell*, 744 F.2d 701 (9th Cir. 1984); *United States v. Long, id.* There is no requirement in conspiracy cases that the government disclose even all overt acts in furtherance of the conspiracy. *United States v. Giese, id.* Moreover, a defendant is not entitled to know all the evidence the government intends to produce, but only the theory of the government's case. He is not entitled to know the content of the testimony of each of the government witnesses before trial. *United States v. Ryland*, 806 F.2d 941, 942 (9th Cir. 1986), *cert. denied*, 481 U.S. 1057 (1987).

Given these standards, defendant's Motion for Bill of Particulars is denied.

C. Motion to Sever.

Defendant's motion to sever pursuant to Rule 14, Federal Rules of Criminal Procedure is denied.[3]

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[3]Although defendant's motion also refers to Rule 8(b), Federal Rules of Criminal Procedure, defendant presents no analysis from which it may be inferred that defendants are improperly joined. Therefore, the court analyzes this motion under the standards governing severance pursuant to Rule 14.

From defendant's briefs in support of this motion, it is apparent that his request for severance of his trial is based on the assertions of mutually antagonistic defenses and *Bruton*.

Defendant asserts that it is "expected" that defendant Romine will assert the defense of entrapment, that Romine will claim that defendant was the "money man," that Romine was working for defendant. Defendant contends that his defense will be innocence and that Romine is responsible for the alleged attempt to purchase methamphetamine.

A motion to sever defendants under Rule 14 "is entrusted to the discretion of the trial court, and in exercising that discretion the courts balance the inconvenience and expense to the government of separate trials against the prejudice to the defendants inherent in a joint trial. The burden is put on the defendants to make a strong showing of prejudice in order to obtain the relief permitted by Rule 14." Wright, 1 *Federal Practice and Procedure*, § 223, pp. 787-788 (1982). Defendant must make a strong showing that a joint trial would be clearly or manifestly prejudicial to him. *United States v. Polizzi*, 801 F.2d 1543, 1553-1554 (9th Cir. 1986). As explained in *Zafiro v. United States*, ___ U.S. ___, 122 L.Ed.2d 317, 325 (1993), "when defendants have been properly joinder under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint

trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."

In *United States v. Sherlock*, 962 F.2d 1349, 1362-1363 (9th Cir. 1989), *cert. denied sub nom. Charley v. United States*, 506 U.S. 958 (1992), the Ninth Circuit held:

> To obtain severance based on [the ground of antagonistic defense], defendants must show that 'the acceptance of one party's defense will preclude the acquittal of the other party.' . . . Antagonism between defenses is insufficient; the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive . . . The defendant must show that '[t]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.'
>
> . . . .
>
> . . .
>
> . . . The mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating the other does not

generate the kind of prejudice that mandates severance.

The court concludes that Romine's defense of entrapment is not mutually antagonistic to Underwood's defense of denial under this standard. The elements of an entrapment defense are that the defendant was not predisposed to commit the crime before being contacted by government agents and that the defendant was not induced by government agents to commit the crime. Romine's evidence concerning a lack of predisposition to commit the crime cannot harm Underwood because it will focus on Romine, not Underwood. Furthermore, Romine's efforts to establish that he was induced by government agents to commit the crime will focus on the actions of the government agents, not on Underwood.

Underwood further moves the court to sever his trial from that of Romine pursuant to *Bruton v. United States*, 319 U.S. 123 (1968) on the ground that his Sixth Amendment right to confront the witnesses against him will otherwise be violated if Romine's post-arrest statement is admitted.

The United States, conceding that the admission of this statement in its present form will violate *Bruton*, contends that the statement may be redacted by deleting the references to Underwood.

In *Richardson v. Marsh*, 481 U.S. 200, 211 (1927), the Supreme Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." The Supreme Court further noted, however, that it was expressing "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." 481 U.S. at 211 n.5.

In *United States v. Vasquez*, 874 F.2d 1515, 1518 (11th Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990), the Eleventh Circuit has ruled that "the admission in a joint trial of a codefendant's confession that is redacted to substitute a neutral pronoun or other general word for the name of the complaining defendant does not violate *Bruton* so long as the confession does not compel a direct implication of the complaining defendant." In *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1359 (9th Cir. 1993), the Ninth Circuit adopted the Eleventh Circuit's rationale, allowing in that case the substitution of the term "individuals" for the names of the two other codefendants.

D. Motion to Inspect and Compel Production of Samples of Alleged Methamphetamine for Independent Testing.

Defendant's motion pursuant to Rule 16, Federal Rules of Criminal Procedure, for an order allowing defendant to independently test and weigh the methamphetamine defendants are alleged to have attempted to purchase from the confidential informant and the undercover officer on February 29, 1996 is denied. Defendant has not shown that this information is material to the preparation of his defense, a prerequisite to discovery under Rule 16. *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). Defendant is charged with conspiracy to possess methamphetamine with intent to distribute and attempt to possess methamphetamine with intent to distribute. Whether or not the substance involved actually was methamphetamine is irrelevant to the proof of or defense to these charges, *United States v. Thompson*, 493 F.2d 305, 308 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *United States v. Bosch*, 951 F.2d 1546, 1550 (9th Cir. 1991), *cert. denied*, 504 U.S. 989 (1992); *United States v. Steward*, 16 F.3d 317, 320 (9th Cir. 1994). Furthermore, in an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance is used to determine the offense level unless the sale is completed. Application Note 12, Commentary to U.S.S.G. § 2D1.1.

E. Motion to Produce for Expert Evaluation and Motion to Compel Government to Disclose Discovery Relating To Frank Hinsley Nunez aka Frank Hensley Nunez.

Defendant moves the court to order the United States to provide in pretrial discovery any law enforcement reports concerning drug dealings by Frank Hinsley Nunez aka Frank Hensley Nunez during September 1996 to the present. Defendant contends that discovery already provided by the United States indicates that Nunez, rather than defendant Underwood, was the "money man" referred to by defendant Romine in recorded conversations with a confidential informant in connection with the narcotics transaction [sic] the subject of this prosecution. Defendant asserts that these law enforcement reports would be indicative of exculpatory evidence and that this information is vital and necessary to his defense.

The court has reviewed the declaration of Assistant United States Attorney Kathleen Servatius and its attached exhibits filed under seal in opposition to this motion.

The court concludes from its review of this declaration and exhibits that the pretrial discovery requested by defendant Underwood is denied.[4]

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[4]In this motion defendant also requested that the court order the original tape recordings be made available to defendant's expert for analysis. This portion of defendant's motion was resolved at the hearing on July

F. Motion for Notice Pursuant to 12(d).

This motion has been resolved.

G. Request for Notice of Intention to Offer Evidence under Rule 404(b).

This notice will be provided in accordance with the court's Standing Order if not previously given by the United States.

IT IS SO ORDERED

Dated: November 14, 1996

Robert E. Coyle

ROBERT E. COYLE
UNITED STATES DISTRICT COURT JUDGE

29, 1996.

occurred 6 times, transporting 5 pounds each load. Fifth, the defendant was in possession of methamphetamine packaged for distribution and had been convicted twice for making and distributing methamphetamine, indicating that he was engaged in sales of methamphetamine and not amphetamines.

Since the defendant faces a life sentence based upon his two prior convictions if the offense involved only one kilogram (2.2 pounds) of methamphetamine, the defendant cannot show prejudice from Romine's mistaken use of the term "amphetamines" during his testimony. If the defendant had challenged the type of controlled substance involved in the offense at his sentencing, the government would have been able to establish that the offenses involved methamphetamine by a preponderance of the evidence. *See Harrison-Philpot*, 978 F.2d at 1524. Proof of only one kilogram (2.2 pounds) was needed to invoke the life sentence provided for in section 841(b)(1)(A) due to the defendant's prior two convictions. The government could have proven 20 pounds involved in count two. In addition, the government could have demonstrated that James and Gonzalez provided at least 17 pounds of methamphetamine to Romine for delivery to Underwood before they were arrested, and another 30 pounds of

"crank" delivered by Olson to Underwood. These amounts are far in excess of the 2.2 pounds needed to prove the defendant's life term of imprisonment.

CONCLUSION

For the foregoing reasons, the defendant's motion to set aside his conviction should be denied.

DATED: April 4, 2000

Respectfully submitted,

PAUL L. SEAVE
United States Attorney

By *Kathleen A. Servatius*
KATHLEEN A. SERVATIUS
Assistant U.S. Attorney